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Safe Harbor for Forward-Looking Statements Under the Private Securities Litigation Reform Act of 1995: What's Safe and What's Not?

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Articles

Safe Harbor for Forward-Looking Statements Under the Private Securities Litigation Reform Act of 1995: What's Safe and What's Not?

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I. Introduction

A. *The Legislation*

The Private Securities Litigation Reform Act of 1995[2] ("PSLRA" or "Reform Act") is the single most important piece of securities legislation passed into law since the Securities Act and Securities Exchange Act were enacted in 1933 and 1934 respectively.[3] The Reform Act had a dual objective. First, it was passed in an effort to limit so-called securities fraud "strike suits."[4]

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2. Pub. L. No. 104-67, 109 Stat. 737 (1995), codified at scattered sections of 15 U.S.C.

3. 15 U.S.C. §§ 77*a* – 77*aa*; *id.* §§ 78*a*-78*ll*.

4. Strike suits are defined as "shareholder derivative actions begun with [the]

These typically have taken the form of class action lawsuits filed by investors in response to a drop in a stock's value, alleging that a statement made by an issuer of the security was either false or misleading.[5] Frequently these suits generate substantial settlement figures, whether or not they have any merit at all.[6] So the primary purpose of the PSLRA was to reduce the number of these types of suits, and the staggering costs associated therewith for issuers and ultimately the companies' innocent shareholder-investors.[7]

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hope of winning large attorney fees or private settlements, and with no intention of benefiting [the] corporation on behalf of which [the] suit is theoretically brought." BLACK'S LAW DICTIONARY 1423 (6th ed. 1990).

5. *See, e.g.*, description of five suits filed on "Marlboro Friday," the day in April 1993 when Phillip Morris announced a price cut, which might reduce its operating results by some 40%. Within five hours of the announcement, the first of five lawsuits to be set forth that day was on file. And on the next business day, the following Monday, five more suits were filed by anxious plaintiff's counsel. Harvey Pitt & Karl Groskaufmanis, *The Securities Litigation Reform Act's Safe Harbor for Forward-Looking Statements Would Deter Fraud Suits Against Companies,* NAT'L L. J., Apr. 17, 1995, at B4.
In re Phillip Morris Sec. Litig. 872 F. Supp. 97, 98 (S.D.N.Y. 1995).

6. Before passage of the Act, some 300 federal securities suits were filed each year; as many as 93% settled out of court at an average cost of $8.6 million; the overall cost to corporate America was pegged at $2.5 billion a year. *See* S. REP. NO. 104-98, at 33 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 711; *see also* Robert A. Prentice & John H. Langmore, *Beware of Vaporware: Product Hype and the Securities Fraud Liability of High-Tech Companies*, 8 HARV. J.L. & TECH. 1, 2 (1994) (reporting that some 500-700 class action securities fraud suits were pending at any one time, the average settlement figure was $10.8 million per suit, and average cost of litigation was $692,000 per suit); Douglas M. Branson, *Running the Gauntlet: A Description of the Arduous, and Now Often Fatal, Journey for Plaintiffs in Federal Securities Law Actions*, 65 U. CIN. L. REV. 3, 27-28 (1996) (stating that some "professional plaintiffs" represented by a specialized plaintiffs' bar own small numbers of shares in as many as 800 publicly traded companies); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 516-517 and 524 (1991) (concluding that the merits do not matter, defendants settled for roughly 20-25% of the amount at stake simply to avoid litigation costs); James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 979 (1996) (concluding that "most securities-fraud class actions are, in fact, frivolous").

7. Testimony about abusive practices heard by the House and Senate Committees included:

> "(1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; . . . (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle . . ."

Statement of Managers–the "Private Securities Litigation Reform Act of 1995," H.R. CONF. REP. NO. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 730 [hereinafter *Statement of Managers*].

Consequently, the statute includes both procedural and substantive provisions[8] designed to discourage the filing of strike suits and, perhaps more importantly, to give judges the power at an early stage in the litigation to dispose of those meritless securities fraud suits that are filed.

Second, recognizing that abusive securities litigation was "muzzling"[9] corporate managers, Congress also sought, through the Reform Act, to encourage securities issuers to disclose more information to the investing public.[10] Thus the Act immunizes some issuer statements with a "safe harbor." Corporate managers[11] who utilize the Act's safe harbor can now more candidly disclose their plans and projections, without fear of providing "grist for the litigation mill."[12] In brief, the statute provides that as long as predictive statements are identified as such and accompanied by meaningful cautionary language, issuers will not be liable for securities fraud if or when the expected results do not materialize.[13]

Ultimately, the Reform Act aims to restore the integrity of the securities litigation system, promoting efficient creation of capital while meeting investors' demand for accurate and abundant disclosure of useful corporate information. Whether it has succeeded in reducing the number of questionable securities fraud suits is an open question.[14] What we do know is that corporations

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8. These include the "safe harbor" discussed *infra* Section I.B. The most frequently treated portion of the statute, by the courts and commentators alike, is its heightened pleading requirements. *See* Greebel v. FTP Software, Inc., 194 F.3d 185 (1st Cir. 1999); *In Re* Comshare, Inc. Sec. Litig., 183 F.3d 542 (6th Cir. 1999); *In re* Advanta Corp. Sec. Litig., 180 F.3d 525 (3d Cir. 1999); Press v. Chem. Inv. Servs. Corp., 166 F.3d 529 (2d Cir. 1999). *See generally* Hillary Sale, *The Implications of the Private Securities Litigation Reform Act Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L. Q. 537 (1998); Steven Rosenfeld, *Federal Courts Disagree on Pleading Securities Fraud*, NAT'L L. J., Sept. 6, 1999, at B07. Other important provisions include: a stay of discovery while a motion to dismiss is pending, 15 U.S.C. § 78u-4(b)(3)(B); rules for designating the most appropriate lead plaintiff and for selection of plaintiffs' counsel, *id.* § 78u-4(a)(3)(B)(i); mandatory Rule 11 inquiry following each case filed under the Act, *id.* § 78u-4(c)(1); proportionate rather than joint and several liability of defendants for defendants who did not act knowingly, *id.* § 78u-4(f)(2)(A), (f)(2)(B)(i), (f)(10)(B). These are beyond the scope of this article.

9. *See Statement of Managers*, *supra* note 7, at 42-43.

10. *See id.* at 32.

11. For a discussion of the safe harbor specifically as it relates to auditor liability, *see* Ann Morales, et al. *'Safe Harbor' Under the Private Securities Litigation Reform Act of 1995*, LXX No 8 CPA JOURNAL 66-68 (2000).

12. *Statement of Managers*, *supra* note 7, at 43.

13. *See* 15 U.S.C. § 78u-5(c).

14. *See, e.g.*, John L. Latham & Todd R. David, *Bears, Bulls and Balance*,

are increasingly drafting their disclosures with the Act's safe harbor in mind[15] and that the courts are increasingly being asked to interpret the Act and to use it as a basis to dismiss cases at the pleading stage.[16]

B. Safe Harbor for Forward-Looking Statements

The subject of this article is the PSLRA's most significant substantive component: a "safe harbor" for that subset of soft information[17] known as "forward-looking statements." These include the following types of information: financial projections, future management plans and objectives, statements of future economic performance including certain such statements made in SEC required disclosure documents, as well as any statement of the assumptions underlying any of the foregoing.[18] Issuers make these

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LEGAL TIMES, Feb. 22, 1999, at S40; Timothy R. Donovan, *New 'Safe Harbor' Is Not Being Well Utilized*, LEGAL TIMES, Jul. 1, 1996, at S29.

15. Several studies have attempted to quantify the effects of the statute on disclosure drafting. *See* Committee on Securities Regulation, *A Study of Current Practices: Forward-Looking Statements and Cautionary Language After the 1995 Private Securities Litigation Reform Act*, 53 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 723 (Nov./Dec. 1998); Gerald S. Backman & Richard A. Rosen, *Forward-Looking Statements and Cautionary Language After the 1995 Reform Act: An Empirical Study*, PRACTICING LAW INSTITUTE, SAILING IN SAFE HARBORS: DRAFTING FORWARD LOOKING DISCLOSURES 153-226 (Ferrara, et al., co-chairs, 1997).

16. Of sixty-three published district court opinions invoking the safe harbor provisions of the Reform Act, twelve were decided in 1997, twenty-five in 1998, and twenty-six in 1999.

17. Soft information is defined as "statements of subjective analysis or extrapolation, such as opinions, motive, and intentions, or forward-looking statements, such as projections, estimates, and forecasts." *In re* Craftmatic Sec. Litig., 890 F.2d 628, 642 (3d Cir. 1989). *See also* Carl W. Schneider, *Nits, Grits, and Soft Information in SEC Filings*, 121 U. PA. L. REV. 254, 255 (1972) (defining soft information as

> "(1) forward-looking statements concerning the future, such as projections, forecasts, predictions, and statements concerning plans and expectations; (2) statements concerning past or present situations when the maker of the statement lacks the data necessary to prove its accuracy . . . ; (3) information based primarily on subjective evaluations . . . ; (4) statements of motive, purpose, or intention . . .; (5) statements involving qualifying words, . . . for which there are no generally accepted objective standards of measurement . . . .").

18. The statutory definition of "forward-looking statement" is as follows:

> A. a statement containing a projection of revenues, income (including income loss), earnings (including earning loss) per share, capital expenditures, dividends, capital structure, or other financial items.
>
> B. a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or

types of disclosures, for example, in reports to shareholders, in annual and current reports filed with the SEC, in press releases, and in conference calls with analysts.

Due to their inherently predictive nature, forward-looking statements are particularly vulnerable to investor-plaintiff "Monday-morning quarterbacking,"[19] or the so-called "fraud-by-hindsight"[20] lawsuit. So, in three specified instances under the Act,[21]

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services of the issuer;

C. a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission;

D. any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);

E. any report issued by an outside reviewer retained by an issuer to the extent that the report assesses a forward-looking statement made by the issuer; or

F. a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

15 U.S.C. § 78u-5(i)(1), §§ 77z-2(i)(1).

19. *See* Stransky v. Cummins Engine Co., Inc., 51 F.3d 1329, 1332 (7th Cir. 1995).

20. *See* Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978); Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040 (6th Cir. 1991); DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990).

21. The pertinent language creating the safe harbor is as follows:

(c) Safe harbor.

(1) *In general.* Except as provided in subsection (b) of this section, in any private action arising under this chapter [15 U.S.C. § 77*a, et seq.* and/or 15 U.S.C. §§ 78*a, et seq.*] that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) of this section shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity;[,] was—

(I) made by or with the approval of an executive officer of that entity; and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

issuers disclosing forward-looking information will be relieved of legal liability: first, when such a disclosure is identified as forward-looking and is accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement" (the "bespeaks caution" prong);[22] second, when a forward-looking statement is deemed to be "immaterial" (the "immateriality" prong);[23] and finally, in any instance where a forward-looking statement is material but it is either not specifically identified as forward-looking and/or it is not accompanied by the required cautionary statements, and the plaintiff is unable to prove actual knowledge of falsity on the part of the issuer making the statement (the "actual knowledge" prong).[24]

This article undertakes to analyze the current status of the safe harbor for forward-looking statements made by issuers. It is divided into five parts. Section II addresses the applicability of the Act. Section III examines pre-Reform Act law briefly, and compares it with the PSLRA. The heart of the article, Section IV,

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15 U.S.C. § 78u-5; *Id.* § 77z-2 (same).

22. *See* Section IV.A, *infra.*

23. This prong has been widely overlooked, but is discussed Section IV.B, *infra.*

24. In light of the highly publicized stricter pleading requirements imposed by the PSLRA, 15 U.S.C. §§ 77z-1(b) and 78u-4(b), in many cases plaintiffs fail even to plead with sufficient particularity the "actual knowledge of falsity" required to prevail on this last prong of the safe harbor. *See, e.g., In re* Advanta Corp. Sec. Litig., 180 F.3d 525 (3d Cir. 1999). *See also* Section V.D. *infra.* Many cases decided under this part of the statute are based on courts' interpretation of the new pleading requirements and substantive law of scienter, and in-depth analysis thereof is outside the purview of this article. For treatment of the new (scienter) pleading requirements under the Reform Act, *see generally* Steven Rosenfeld, *Pleading Scienter Under the Private Securities Litigation Reform Act of 1995*, 31 SEC. & COMM. REG. 25 (1998); William S. Lerack & Eric A. Isaacson, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893 (1996); Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675 (1996); Sherrie R. Savett & Arthur Stock, *What to Plead and How to Plead the Defendants' State of Mind in a Federal Securities Class Action: the Plaintiff's Perspective*, 30 INST. ON SEC. REG. 807 (1998); Ryan G. Meist, *Would the Real Scienter Please Stand Up: The Effect of the Private Securities Litigation Reform Act of 1995 on Pleading Securities Fraud*, 82 MINN. L. REV. 1103 (1998); Michael B. Dunn, Note, *Pleading Scienter After the Private Securities Litigation Reform Act, or*, A Textualist Revenge 84 CORNELL L. REV. 193 (1998); Patricia J. Meyer, Note, *What Congress Said about the Heightened Pleading Standard: A Proposed Solution to the Securities Fraud Pleading Confusion*, 66 FORDHAM L. REV. 2517 (1998). *See also* Richard H. Walker & J. Gordon Seymour, *Recent Judicial and Legislative Developments Affecting the Private Securities Fraud Class Action*, 40 ARIZ. L. REV. 1003, 1023-1028 (1998).

focuses on the parameters of the first two prongs of the safe harbor – the "bespeaks caution" prong, and the "immateriality" prong. There, some conclusions are drawn with regard to what will qualify as "forward-looking statements" and "meaningful cautionary statements," as well as what may be considered "immaterial" under the Act, based on a review of all PSLRA case law. A brief discussion of the third prong, the "actual knowledge prong" and its place in safe harbor analysis follows. Section V concludes by setting forth those rules that can be gleaned from existing PSLRA case law.

II. Who is Protected for What Statements in Which Transactions?

Not all makers of forward-looking statements are afforded protection by the safe harbor. Those who are covered are the securities issuers themselves, [25] corporate officers, directors or employees who are acting on behalf of issuers,[26] outside reviewers retained by issuers to make statements on behalf of issuers[27]—which has been taken to include reports by accounting firms, for example[28]—and underwriters, when they are making statements based on information provided by the issuer or information derived from information supplied by the issuer.[29] Brokers' statements, however, are not protected by the Act's safe harbor.[30]

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25. "Issuers" under the Act are defined as those securities issuers who are "subject to the reporting requirements of section 13(a) or section 15(d) of the Securities Exchange Act of 1934." 15 U.S.C. § 78u-5(a)(1). In other words, it is those SEC registrants that are required to file annual, quarterly, and current reports with the SEC that may qualify for safe harbor treatment. *See id.* §§ 78m(a) and 78o(d). The statute does not protect any issuers who within three years of the statement have violated anti-fraud provision of the securities laws, or who are not otherwise in compliance with SEC filing and reporting requirements. *Id.* § 78u-5(b)(1)(A).

26. *See id.* § 78u-5(i)(6).

27. *See id.* § 78u-5(a)(3).

28. Noelle Matteson, Comment, *Private Securities Litigation Reform* Act *of 1995: Do Issuers Still Get Soaked in the Safe Harbor?*, 27 GOLDEN GATE U. L. REV. 527, 534 n.57 (1997).

29. 15 U.S.C. § 78u-5(a)(4). Some have suggested that this leaves open whether reports issued after the quiet period by underwriters' analysts are covered, given that such analysts are not acting on behalf of the issuer and are not themselves underwriters. *See* Richard A. Rosen, *"The Implications of The Private Securities Litigation Reform Act The Statutory Safe Harbor For Forward-Looking Statements After Two and a Half Years: Has it Changed the Law? Has it Achieved What Congress Intended?,"* 76 WASH. U. L. Q. 645, 648 (1998).

30. The legislative history makes crystal clear that the safe harbor is inapplicable to statements made by securities brokers. *See Statement of Managers, supra* note 7, at 45.

Likewise, the safe harbor is not applicable to forward-looking statements made in all types of transactions. Predictive disclosures that are made in connection with initial public offerings, tender offers, "going private" transactions, the issuance of penny stocks, and a number of other inherently risky transactions are excluded from protection by the Act.[31] The statute also expressly exempts from its coverage those disclosures made in financial statements prepared in conformity with GAAP.[32]

Both oral[33] and written forward-looking disclosures are covered by the Act. To be protected, written disclosures should contain safe harbor warnings – express language identifying state-

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31. 15 U.S.C. § 78u-5(b)(1)-(2). The Act's safe harbor also does not apply to statements made in connection with offerings by blank check companies, offerings by or statements made in relation to the operations of partnerships, limited liability companies, and direct participation investment programs, statements made in connection with rollup transactions, those contained in the registration statements of investment companies, and in Exchange Act Section 13(d) filings disclosing beneficial ownership. *Id.*

32. *Id.* § 78u-5(b)(2)(A). Two PSLRA cases involving alleged intentional deviations from GAAP are Gross v. Medaphis Corp., 977 F. Supp. 1463, 1473 (N.D. Ga. 1997); and *In re* Employee Solutions Sec. Litig., No. CIV 97-545-PHX-RGS-OMP, 1998 U.S. Dist. LEXIS 16444, at *10 (D. Ariz. 1998) (holding that inaccurate or misleading statements set forth in an issuer's financial statements are "statements of historical fact," which can not qualify for safe harbor protection because they are not forward-looking).

33. Section 21E(c)(2) of the Act governs oral forward-looking statements:

> (2) forward-looking statement made by an issuer that is subject to the reporting requirements of section 13(a) or section 15(d) [15 U.S.C. § 78m(a) or 78o(d)], or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1)(A) shall be deemed to be satisfied—
>
> (A) if the oral forward-looking statement is accompanied by a cautionary statement—
>
> (i) that the particular oral statement is a forward-looking statement; and
>
> (ii) that the actual results might differ materially from those projected in the forward-looking statement; and
>
> (B) if—
>
> (i) the oral forward-looking statement is accompanied by an oral statement that additional inform-ation concerning factors that could cause actual results to materially differ from those in the forward-looking statement is contained in a readily available written document, or portion thereof;
>
> (ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and
>
> (iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

15 U.S.C. § 78u-5(c)(2).

ments as forward-looking and providing the cautionary language required by the Act. However, the statute takes a more "flexible" approach to exempting verbal forward-looking statements.[34] To fall within the safe harbor, oral statements can but need not include the required cautionary language. Instead, the speaker may simply advert the listener to specific cautionary language that satisfies the statute but which is contained in a "readily available written document" or a portion thereof.[35]

III. History: the "Bespeaks Caution" Doctrine and SEC Safe Harbor Rules

For those issuers to whom and for those statements to which the statutory safe harbor applies, its protection is potentially powerful. But like all statutes, its boundaries necessarily are and will continue to be defined, *inter alia*, by the courts' interpretation of what actually constitutes a "forward-looking statement" and of what will suffice as "meaningful cautionary language."[36] To understand these, a review of the statute's jurisprudential underpinnings is in order.

The PSLRA became effective on December 22, 1995. Any and all suits that had been filed as of that time were not affected by the new legislation.[37] As a result, there is a relative paucity of judicial opinions specifically interpreting the safe harbor. Nonetheless, we are not completely without guidance as to how protected forward-looking statements will be treated by the courts. This is true because long before the Reform Act was enacted, there was already an expansive body of judge-made law holding that plaintiffs could not base securities fraud claims on forward-looking statements if such statements were accompanied by language that "bespeaks caution" as to reliance thereupon.[38] The judicially created "bespeaks caution" doctrine was born in the Eighth Circuit in 1986.[39] That doctrine, whose genesis was likely a footnote from as

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34. *Statement of Managers*, *supra* note 7, at 45.

35. *See* notes 117-122, *infra,* and accompanying text.

36. As noted previously, the precise contours of the safe harbor will also continue to be determined by the courts' definition of scienter and the proper pleading thereof. *See* note 22, *supra.*

37. The Reform Act applies to cases filed after December 22, 1995, regardless of when the allegedly fraudulent statements were made. *See, e.g.,* Wenger v. Lumisys, Inc., 2 F. Supp. 2d 1231, 1240 n.7 (N.D. Cal. 1998).

38. *See, e.g., In re* Donald J. Trump Casino Sec. Litig., 793 F. Supp. 543, 549 (D.N.J. 1992) *aff'd*, 7 F.3d 357 (3d Cir. 1993), *cert. denied*, 510 U.S. 1178, 114 S. Ct. 1219 (1994).

39. *See* Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986).

as 1977,[40] has since been adopted by ten[41] of the thirteen federal Circuit Courts of Appeal.[42]

A. The SEC Safe Harbor Rules

Since 1979, a limited regulatory safe harbor in SEC Rules 175 and 3(b)(6) has been in effect specifically for forward-looking statements made as part of the required disclosures contained in reports filed with the SEC.[43] Due to their narrow scope, however, few cases have been decided based on these rules.[44] Instead, until the passage of the PSLRA, defendants in securities fraud cases brought under the '33 and '34 Acts that involved forward-looking

40. *See* Polin v. Conductron Corp., 552 F.2d 797, 806 n.28 (8th Cir. 1977).

41. *See* Grossman v. Novell, Inc., 120 F.3d 1112, 1121 (10th Cir. 1997); Harden v. Raffensperger Hughes & Co., 65 F.3d 1392, 1404-06 (7th Cir. 1995); Saltzberg v. TM Sterling/Austin Assocs., 45 F.3d 399, 400 (11th Cir. 1995); *In re* Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1414 (9th Cir. 1994), *cert. denied*, 516 U.S. 909 (1995); Rubinstein v. Collins, 20 F.3d 160, 167 (5th Cir. 1994); *In re* Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 364 (3d Cir. 1993); Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040 (6th Cir. 1991); *cf.* Mayer v. Mylod, 988 F.2d 635, 639 (6th Cir. 1993); I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., 936 F.2d 759, 763 (2d Cir. 1991); Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 (1st Cir. 1991); Polin v. Conductron Corp., 552 F.2d 797, 806 (8th Cir. 1977). The Fourth Circuit has declined to adopt the "bespeaks caution" doctrine, opting for a more restrictive rule. In that circuit, forward-looking statements are not actionable unless they are worded as guarantees. *See* Hillson Partners Ltd. v. Adage, Inc., 42 F.3d 204, 218-219 (4th Cir. 1994); Malone v. Microdyne Corp., 26 F.3d 471, 479 (4th Cir. 1994); Raab v. Gen. Physics Corp., 4 F.3d 286, 290 (4th Cir. 1993).

42. Complete treatment of the "bespeaks caution" doctrine is beyond the scope of this article. However, for a good introduction to it, see Donald C. Langevoort, *Disclosures that 'Bespeak Caution'*, 49 BUS. LAW. 481 (1994). It should be noted that the legislative history of the PSLRA unequivocally indicates that the statutory safe harbor is not intended to replace the "bespeaks caution" doctrine, nor to preclude its further development in the courts. *Statement of Managers, supra* note 7, at 46.

43. *See* 17 C.F.R. §§ 230.175(c), 240.3b-6(c). These regulations were striking when promulgated, in that they reversed the SEC's longstanding prohibition on disclosure of forward-looking statements. *See* Disclosure of Projections of Future Economic Performance, Securities Act Release No. 5362 [1972-73 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,211, at 82,667 (Feb. 2, 1973). For a more in depth discussion of the SEC's policy change, see Bruce A. Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 MD. L. REV. 1114 (1987); John M. Olivieri, Note, *Liability for Forward-Looking Statements: The Securities and Exchange Commission's Ambiguous Stance*, 1993 COLUM. BUS. L. REV. 221 (discussing history of change in SEC's practice).

44. *See, e.g,. In re* NationsMart Corp. Sec. Litig., 130 F.3d 309 (8th Cir. 1997); Arazie v. Mullane, 2 F.3d 1456 (7th Cir. 1993); Fugman v. Aprogenex, Inc., 961 F. Supp. 1190 (N.D. Ill. 1997).

statements, usually sought the shelter of the broader "bespeaks caution" doctrine.

B. The "Bespeaks Caution" Doctrine

Generally, the "bespeaks caution" doctrine "provides a mechanism by which a court can rule as a matter of law . . . that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud."[45] One circuit court described the doctrine so: "To put it another way, the 'bespeaks caution' doctrine reflects the unremarkable proposition that statements must be analyzed in context."[46]

In the typical dismissal based on the doctrine, specific cautionary language is identified, which is found to be "substantive and tailored to the specific future projections, estimates or opinions in the [challenged disclosure document]."[47] Courts applying the doctrine then hold either that the cautionary language renders the forward-looking statements immaterial as a matter of law, or that in light of cautionary language no reasonable investor would have relied on the forward-looking statements in the first place.[48]

C. Comparison to the PSLRA Safe Harbor

Though the "bespeaks caution" doctrine and the statutory safe harbor are similar in their underlying purpose[49] and in the sense that they both exempt issuers from liability for forward-looking statements where cautionary language is present, there are differences between the two. First, the "bespeaks caution" doctrine is much broader in its application than is the statutory safe harbor.

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45. Langevoort, *supra* note 42, at 482-83.

46. *Worlds of Wonder*, 35 F.3d at 1414 (citing *Rubinstein*, 20 F.3d at 167 (5th Cir. 1994). *See also Trump*, 7 F.3d at 364 (proposing that "[the doctrine] represents new nomenclature rather than substantive change in the law.").

47. *Trump*, 7 F.3d at 371-72.

48. *See id. See also Rubinstein*, 20 F.3d at 167.

49. *See Worlds of Wonder*, 35 F.3d at 1415 ("In our view, the bespeaks caution doctrine helps 'to minimize the chance that a plaintiff with a largely groundless claim will bring a suit and conduct extensive discovery in the hopes of obtaining an increased settlement.'") (quoting Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878 (1st Cir. 1991)).

It applies to a wider range of transactions[50] and types of statements[51] than does the Reform Act.[52]

And substantively, the "bespeaks caution" doctrine appears to be supported by numerous rationales. Scholars have noted that courts applying the bespeaks caution doctrine generally ground it in terms either of materiality or reliance or a combination of the two.[53] The statutory language itself and the legislative history of the Act seem to indicate that the safe harbor instead is based entirely on a materiality analysis.[54] In other words, as to the first two prongs of the statute, forward-looking statements are neutralized – or rendered immaterial – by sufficient cautionary language, or they are found to be immaterial on other grounds.

Finally, the "bespeaks caution" doctrine views all forward-looking statements in their context, to determine whether, based on the "total mix" of information available to the reader, the forward-looking statements are shielded from liability because they bespeak caution.[55] The PSLRA's delineation of sufficient cautionary language is a much brighter line: the statute simply requires the issuer to identify "important factors that could cause actual results to differ materially from those in the forward-looking statements."[56]

Thus, though many commentators have generalized that the Reform Act's safe harbor merely codified the "bespeaks caution" doctrine, in reality the two are not completely coextensive, and it may be that the Act's safe harbor is more protective within its domain.[57] Nonetheless, perhaps out of an abundance of caution, courts have regularly continued to base their decisions, at least in

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50. *See, e.g, In re* Worlds of Wonder Sec. Litig., 814 F. Supp 850 (N.D. Cal. 1993) (initial public offering); Saltzberg v. TM Sterling/Austin Assocs., 45 F.3d 399 (11th Cir. 1995) (private placement); Romani v. Shearson Lehman Hutton, 929 F.2d 875 (1st Cir. 1991) (limited partnership).

51. *See, e.g.*, Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 949 F.2d 243 (8th Cir. 1991) (financial feasibility study attached to offering materials).

52. *See* notes 23-30, *supra*, and accompanying text.

53. *But see* Jennifer O'Hare, *Good Faith and the Bespeaks Caution Doctrine: It's Not Just a State of Mind,* 58 U. PITT. L. REV. 619, 630 (1997) (postulating that there is yet another rationale for the "bespeaks caution" doctrine, occurring when a court finds that the cautionary language renders the forward-looking statement not false or misleading).

54. *See id.*

55. *See In re* Donald J. Trump Casino Sec., 7 F.3d 357, 371 (3d Cir. 1993).

56. 15 U.S.C. § 78u-5(c) (quoted in note 21, *supra*).

57. *See* Edward Brodsky, *Making the Safe Harbor Safer*, N.Y.L.J., Feb. 10, 1999, at 3. *Cf.* Erin M. Hardtke, Comment, *What's Wrong with the Safe Harbor for Forward-Looking Statements? A Call to the Securities and Exchange Commission to Reconsider Codification of the Bespeaks Caution Doctrine,* 81 MARQ. L. REV. 133, 151-153 (1997).

part, on the "bespeaks caution" doctrine, even in cases to which the Act applies.[58] Circuit Court opinions applying the safe harbor, though, are beginning to appear with regularity.

IV. Court Interpretations of the Statutory Safe Harbor

As stated previously, the Act's safe harbor consists of three possible inlets in which forward-looking statements can find refuge. The first prong is the so-called "bespeaks caution" prong,[59] which shelters statements that are identified as forward-looking and that are accompanied by cautionary language.[60] The second is the "immateriality" prong, which protects those forward-looking disclosures that can be characterized as "immaterial" as a matter of law.[61] Finally, if a forward-looking statement is neither accompanied by the requisite cautionary language nor deemed by the court to be immaterial, its maker still will be insulated from liability if the plaintiff does not prove the statement was made with actual knowledge of its falsity.[62]

So, at the crux of the PSLRA safe harbor analysis are three questions. As a threshold matter, what language actually qualifies as a forward-looking statement? Then, of what does the required "meaningful cautionary" language consist? And finally, what will be found to be "immaterial"?

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58. Some recent cases that have been decided using a mixture of pre-Reform and post-Reform Act law include: Wenger v. Lumisys, Inc. 2 F. Supp. 2d 1231 (N.D. Cal. 1998); Rasheedi v. Cree Research, Inc., No. 1:96CV00890, 1997 U.S. Dist. LEXIS 16968 (M.D.N.C. Oct. 17, 1997); Harris v. IVAX Corp., 998 F. Supp. 1449 (S.D. Fla. 1998); *In re* ValuJet, Inc. Sec. Litig., 984 F. Supp. 1472 (N.D. Ga. 1997) (treats safe harbor and "bespeaks caution" doctrines as one and the same). PSLRA cases decided using "bespeaks caution" doctrine without any safe harbor analysis include: Cherednichenko v. Quarterdeck Corp., No. CV97-4320-GHK, 1997 U.S. Dist. LEXIS 23107 (C.D. Cal. Nov. 26, 1997); Powers v. Eichen, 977 F. Supp. 1031 (S.D. Cal. 1997); *In re* Grand Casinos Sec. Litig., 988 F. Supp. 1273 (D. Minn. 1997).

59. 15 U.S.C. §78u-5(c)(1)(A)(i) (quoted in note 21, *supra*).

60. If the court finds the statement is forward-looking and is accompanied by meaningful cautionary language, no inquiry is to be made into the defendant's state of mind. *See Statement of Managers, supra* note 7, at 44. Whether this creates a loophole for defendants to knowingly make false projections, cloaking them with cautionary language, is outside the scope of this article. This has been decried by some. *See* O'Hare, *supra* note 53, at 643-44 (quoting statements of Senators Biden, Boxer, and Sarbanes to the effect that the lack of a good faith requirement in the safe harbor gives issuers a "license to lie"); John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung,* 51 BUS. LAW. 975, 989 (1996). For a policy argument in support of this result, see Rosen, *supra* note 29, at 657.

61. 15 U.S.C. § 78u-5(c)(1)(A)(ii) (quoted in note 21, *supra*).

62. *Id.* § 78u-5(c)(1)(B) (quoted in note 21, *supra*).

The statute enumerates the types of predictive statements that qualify for safe harbor protection, and judicial interpretation to date has filled in some of the gaps. Vis-à-vis cautionary language, the statute gives little guidance as to what will qualify as "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." Only a few courts have yet to address the issue under the PSLRA. And, no court appears as yet to have utilized the "immateriality prong" *per se*. Nonetheless, some general guidelines can still be gleaned from consideration of recent opinions and from the still viable pre-Reform Act law.

A. The "Bespeaks Caution" Prong of the Safe Harbor

1. What Qualifies as a Forward-Looking Statement?

a. The Eleventh Circuit's Decision in Harris v. IVAX Corp.—The leading case interpreting what will and will not qualify as forward-looking is *Harris v. IVAX Corp.*[63] *Harris* was a class action suit brought by investors against drug manufacturer IVAX, its chairman, CEO, and CFO, alleging Rule 10b-5 and Rule 10(b) violations based on several of the company's press releases. The first of the press releases acknowledged some setbacks but expressed optimism. A later press release announced a $179 million loss, the bulk of which was attributable to a goodwill write-down. Plaintiffs alleged that the failure to include the possibility of the large goodwill charge in the list of factors that could affect the first press release's projections (or cause them to be materially different) amounted to fraud.[64]

In *Harris*, the Eleventh Circuit affirmed the district court's dismissal of plaintiff's securities fraud complaint, finding that each[65] of the statements of which plaintiffs complained was forward-looking and therefore within the ambit of the safe harbor.[66] The *Harris* opinion is particularly instructive on this point because it considered a variety of forms of forward-looking statements. For example, language of expectation like: "reorders are expected to

63. 182 F.3d 799 (11th Cir. 1999).

64. *See id.* at 802.

65. The *Harris* court concluded that company communications are to be examined piecemeal to determine as to each whether the safe harbor applies. *See id.* at 804.

66. As to each of the forward-looking statements, the court subsequently found them to be accompanied by sufficient cautionary language so as to be shielded from liability under the PSLRA. *See id.* at 803.

improve as customer inventories are depleted," according to *Harris*, will fall squarely within the statutory definition of a forward-looking statement.[67] According to the court, this was clearly a "statement of assumptions upon which" a statement of future economic performance was based, one of the four specifically articulated categories of forward-looking information in the Act.[68]

A more problematic type of statement considered by the Eleventh Circuit was: "the challenges unique to this period in our history are now behind us." This statement utilizes the present tense to convey an anticipatory message[69] but still will be protected, notwithstanding "purely grammatical argument[s] to the contrary."[70] In holding that hopeful statements couched in the present tense are forward-looking, the court said that any statement about the state of a company "whose truth or falsity is discernible only after it is made necessarily refers only to future performance."[71]

Finally, the *Harris* court analyzed what it called a "laundry list" or "mixed statement" and, in so doing, held that "when the factors underlying a projection or economic forecast include both assumptions [underlying a forward-looking statement] and statements of known fact, and a plaintiff alleges that a material factor is missing, the entire list of factors is treated as a forward-looking statement."[72] There, an IVAX press release contained a list of factors relating to its business and which the company said would influence the upcoming quarter's results. Apparently three of the listed factors

67. *See id.* at 804. *See also In re* PLC Systems, Inc. Sec. Litig., 41 F. Supp. 2d 106, 117 (D. Mass. 1999) (characterizing statements like "we expect that full approval could be granted in the summer months," and "PLC believes its . . . application . . . is on track for approval this year" as "aspiratory" and therefore forward-looking under the statute).

68. *See Harris*, 182 F.3d at 804.

69. *Id.* at 805The court considered the statement "our fundamental business and its underlying strategies remain intact . . . . Only a limited number of companies are positioned to meaningfully participate in this rapidly growing market and, among them, IVAX is certainly very well positioned" to be essentially the same, a "hopeful outlook" stated in present tense terms:

> "While it is true that the *state* of Ivax's 'fundamental business' and 'underlying strategies' is a question of present condition, whether they are intact is a fact only verifiable by seeing how they hold up in the future. Likewise, whether Ivax is 'well-positioned' is a statement whose truth can only be known after seeing how Ivax's future plays out."

Id. at 805.

70. *Id.*

71. *Id.*

72. *Id.* at 807. *See also* Elhert v. Singer, 85 F. Supp. 2d 1269 (M.D. Fla. 1999).

were clearly statements of historical fact.[73] Two others were not.[74] Plaintiffs alleged that the list was misleading in that it failed to forecast the possibility of the large goodwill reduction. Since the argument was that the list itself was misleading by omission, for purposes of safe harbor analysis, the list as a whole had to be either forward looking or not. It was, as the court expressed it, a "unit" for liability purposes.[75]

b. Other Circuit and District Court Opinions—The only other circuit court opinion so far to analyze disclosures' status as forward-looking under the Act is *In re Advanta Corp. Sec. Litig.*[76] There the Third Circuit felt comfortable that the statement "over the next six months Advanta will experience a large increase in revenues" fit squarely into the statute's safety net for "projection of revenues."[77] Likewise, the statement "as [Advanta] converts more than $5 billion in accounts that are now at teaser rates of about 7% to its normal interest rate of about 17%" was held to fall under the statute's protection for "statement[s] of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the isuer."[78] Thus, where the company instead converted accounts to 13% and 14% rates, and actual knowledge of falsity was not adequately pled, there was no liability.[79]

Lower courts have also considered individual disclosures under the PSLRA safe harbor. For example, in *In re Boeing Sec. Litig.*[80] the court addressed the following disclosure contained in a company press release:

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73. These were: "customer re-orders remain depressed," "prices have continued to decline," and "a wholesaler customer who owed us approximately $16 million filed a Chapter 11 bankruptcy petition." *Harris,* 182 F.3d at 806.

74. The statements "we expect reserves for returns and inventory writeoffs to be well above typical quarters" and "lower prices... will increase shelf stock adjustments" were both deemed to be assumptions underlying other predictions contained in the statement, and therefore forward-looking. *Id.*

75. *Id.*

76. 180 F.3d 525 (3d Cir. 1999).

77. *Id.* at 536 (citing 15 U.S.C.A. § 78u-5(i)(1)(A)).

78. *Id.* (citing 15 U.S.C.A. § 78u-5(i)(1)(B)). *See also* Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 47 F. Supp. 2d 546, 556 (D.N.J. 1999) (finding that disclosures regarding proposed merger were "plans for future operations" under this section of the statute); *cf.* Queen Uno Ltd. Partnership v. Coeur D'Alene Mines Corp., 2 F. Supp. 2d 1345, 1357 (D. Colo. 1998) (holding that detailed representations regarding the expected production levels at mining facilities were assumed to be forward-looking "statement[s] of the plans and objectives of manage-ment for future operations").

79. 180 F.3d at 536-537.

80. 40 F. Supp. 2d 1160 (D. Wash. 1998).

> The rapid production rate buildup has resulted in a substantial increase in employment, material, and fabrication demand at the Company and its suppliers. Skill training requirements and parts shortages have created out-of-sequence work at Company facilities and at supplier locations. Overtime in engineering and production areas continues at high levels. As a result, the commercial aircraft business is experiencing a near-term decline in productivity. For the longer term, progress continues to be made in developing and implementing design and production systems to improve efficiency and reduce cycle times.[81]

The court broke the disclosure up into three parts. The statement that the company "*is experiencing* a near-term decline in productivity"[82]—though stated in the present tense—was given the benefit of the doubt and deemed to be forward-looking "to the extent Boeing is projecting a near term decline in productivity."[83] Likewise, the statement that "longer term progress *continues to be made* in developing and implementing systems to improve efficiency"—though clearly containing both forward-looking and present tense components—was held to be forward-looking to the extent it indicated that the company expected that progress would continue to be made in the future.[84] It is noteworthy that the result here would have been the same under the newer *Harris* test that makes statements that are "verifiable only after declared" forward-looking under the Act.

The court then considered the first part of Boeing's disclosure. The description of then-current production problems was held to be outside the statute's definition of forward-looking statements, despite defendant's argument that these were "assumptions underlying projections and expectations."[85] Instead the Court held these were simply "present facts" that, if given safe harbor protection, "would allow the exception to swallow the rule."[86]

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81. *Id.* at 1168.
82. *Id.* at 1168 (emphasis added).
83. *Id.*
84. *Id.* (emphasis added).
85. Such assumptions are included in the statutory definition of forward-looking statements. 15 U.S.C. §78u-5(i)(1)(E) (quoted in note 18 *supra*).
86. 40 F. Supp. 2d. at 1169. *See also* Robertson v. Strassner, 32 F. Supp. 2d 443, 450 (S.D. Tex. 1998) (holding that the statement "other Viosca Knoll developments are presently progressing on the original construction schedule," was an existing fact and not forward-looking under the statutory definition); *cf.* Hockey v. Medhekar, No. C96-0815MHP, 1997 U.S. Dist. LEXIS *15-16 (N.D. Cal., Apr. 14, 1997) (holding that statements dealing with existing facts such as robust product demand or shifts in product mix are "assumptions underlying or relating to" statements of future economic performance, and are forward-looking

Other district court holdings are in accord, refusing to grant forward-looking statement status to existing or historical facts.[87]

c. Nondisclosure of Existing Facts is not Forward-Looking—In a related vein, in cases involving nondisclosure of material existing facts district courts have also refused to characterize the statements that *are* made as forward-looking. For example, in *In re BankAmerica Corp. Sec. Litig.*,[88] the company entered into a high-risk trading relationship with D.E. Shaw & Co., a hedge fund. The relationship involved a $1.4 billion unsecured loan to Shaw, which Shaw was to manage as a separate trading portfolio, returning 50% of any profits to BankAmerica.[89] Initial corporate disclosures advised investors that the company had "established a relationship" or a "strategic relationship" with Shaw.[90] A press release referred to the Shaw relationship as a "financing relationship that did not result in any ownership interest by either firm in the other,"[91] and numerous other disclosures characterized the relationship simply as "one which would enhance [the Company's] ability to offer [additional financial] products to its customers."[92]

Subsequently, at a September 1998 press conference held in connection with BankAmerica's merger with NationsBank, the company's CEO reported that the bank had outstanding loans to hedge funds in an amount "below $300 million," that it had an "investment" in Shaw, and that all such loans were secured.[93] At that time, Shaw was experiencing massive losses due to Russia's August 1998 debt default and its effect on the prices of U.S. Treasury Bonds. BankAmerica's third quarter earnings release ultimately disclosed, among other things, that a $372 million charge off of the Shaw loan would be taken, that $70 million in income related thereto would be reversed, and that the company would

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as defined by the Act).

87. *See In re* Cendant Corp. Litig., 60 F. Supp. 2d 354, 375 (D.N.J. 1999) (holding that the statement that company had discovered potential accounting irregularities among certain former CUC business units was not a forward-looking statement under the statute); *see also In re* Quintel Entertainment Inc. Sec. Litig., 72 F. Supp. 2d 283, 292 (S.D.N.Y. 1999); *In re* Aetna Inc. Sec. Litig., 34 F. Supp. 2d 935, 948 (E.D. Pa. 1999); *In re* Olympic Fin. Ltd. Sec. Litig., No. Civ. 97-496, 1998 U.S. Dist. LEXIS 14789, at *13 (D. Minn. Sept. 10, 1998).

88. 78 F. Supp. 2d 976, 983 (E.D. Mo. 1999).

89. *See id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *BankAmerica*, 78 F. Supp. 2d. at 984.

have to purchase Shaw's $20 billion fixed-income securities portfolio to avoid more than $175 million in additional losses.[94]

Defendants in the case argued that the information regarding the Shaw losses was forward-looking, in that though the company knew the extent of the investment in Shaw, the losses from that investment were not actualized until the decision to take the write downs was officially made the day before the third quarter earnings release was issued.[95] The court was not persuaded, holding that information regarding the Shaw losses was not forward-looking at all, but instead "pre-existing hard facts" that should have been disclosed.[96] Other courts have come to the same conclusion in cases involving allegations of failure to disclose presently known facts.[97]

d. Towards Refining the Definition of "Forward-Looking Statement"—Has a clearer definition of "forward-looking statement" emerged since the Act was passed? On this interim point, at least the following appear to be clear from the cases decided thus far: (1) plans and projections couched in language of expectation will be treated as forward-looking; (2) regardless of the use of anticipatory language, undisclosed statements of existing fact will not be deemed to be forward-looking; (3) despite the tense of the verbs chosen, statements that generally cannot be verified until after they are made are forward-looking (4) mixed lists, where an omission is alleged, will be treated as a unit for purposes of safe harbor treatment—the list as a whole will either qualify as forward-looking or not.

2. *What Will Qualify as "Meaningful Cautionary Statements"?* —Once it is determined that a disclosure is forward-looking, the court proceeds then to a consideration of the cautionary language accompanying it. Under the Act, a written forward-looking statement will be protected only if it is "identified as [such] and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement."[98]

a. Safe Harbor "Warnings"—Issuers are now in the practice of including "safe harbor warnings" with their disclosures.

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94. *See id.*
95. *See id.* at 944, 996-97.
96. *Id.* at 99 fn.10.
97. *See, e.g., In re* Oxford Health Plans, Inc., Sec. Litig., 187 F.R.D. 133 (S.D.N.Y. 1999); Walsingham v. Biocontrol Tech., Inc., 66 F. Supp. 2d 669 (W.D. Pa. 1998); *In re* MobileMedia Sec. Litig., 28 F. Supp. 2d 901 (D.N.J. 1998); *In re* ValuJet, Inc., Sec. Litig., 984 F. Supp. 1472 (N.D. Ga. 1997).
98. 15 U.S.C. §78u-5(c)(1)(A)(i) (quoted in note 17 *supra*).

For example, each of the press releases at issue in *Harris* contained the following warning:

> Statements made in this press release, including those relating to . . . [list of disclosure topics] . . . are forward looking and are made pursuant to the safe harbor provisions of the Securities Reform Act of 1995. Such statements involve risks and uncertainties which may cause results to differ materially from those set forth in these statements. . . . In addition to the factors set forth in this release, . . . [list of specific risk factors] . . . could affect the forward looking statements contained in this press release.[99]

Though the statute provides no guidance as to which "important factors" must be listed, the legislative history does. The original House bill required only a recitation that "actual results could differ" from those predicted in the forward-looking statement.[100] By choosing instead to require identification of important factors, Congress clearly rejected the proposition that a boilerplate warning would suffice. This comports with existing case law decided under the "bespeaks caution" doctrine.[101] On the other end of the spectrum, though, Congress rejected an SEC proposal to require identification of the factors "most likely to cause actual results to differ," [102] instead adopting the present requirement that the cautionary language identify only "important factors that could cause actual results to differ materially" from those set forth in the disclosure.

b. Boilerplate Will Not Suffice—So what will qualify as "important factors?" The Act's legislative history warns that "the cautionary statements must convey substantive information about factors that realistically could cause results to differ . . . such as information about the issuer's business."[103] Commentators and judges alike have postulated that the safe harbor thus codifies or incorporates the "bespeaks caution" doctrine's requirement[104] that

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99. Harris v. IVAX Corp., 998 F. Supp. 1449, 1450-51 (S.D. Fla. 1998). *See also In re* PLC Sys., Inc. Sec. Litig., 41 F. Supp 2d 106, 113 (D. Mass. 1999) (noting that each press release contained the following disclaimer: "Note: Certain of the above statements may be forward looking statements . . .").

100. Rosen, *supra* note 29, at 653.

101. *See In re* Donald J. Trump Casino Sec. Litig., 7 F.3d 357 (3d Cir. 1993).

102. Rosen, *supra* note 29, at 653.

103. *Statement of Managers*, *supra* note 7, at 43.

104. *See, e.g.*, John Avery, *Securities Litigation Reform: The Long and Winding Road to the PSLRA of 1995*, 51 BUS. LAW. 335, 355 (1996) (referring to this prong of the safe harbor as the "bespeaks caution" prong); Rosen, *supra* note 29, at 653; Brodsky, *supra* note 57; *Harris,* 998 F. Supp. at 1453 ("This provision was based

cautionary statements be "substantive and tailored to the specific future projections, estimates or opinions in the [disclosure document] which the plaintiffs challenge."[105]

Accordingly, in *In re Computer Associates Sec. Litig.*,[106] the cautionary language consisted of the following statements: (1) that "there can be no assurances that future results will be achieved," and (2) that there were "important factors that could cause actual results to differ materially." These were held to be general boilerplate disclaimers and therefore insufficient to bring the forward-looking statements into the safe harbor.[107]

Similarly in *Boeing*, where the company had predicted a "near term decline in productivity," its statements describing the cause of the company's then-current production problems[108] did nothing to "warn investors of factors that could cause a steeper decline in the Company's productivity or an extension of that period of inefficiency."[109] These statements, therefore, were denied safe harbor protection.[110] Likewise, where the projection was that Boeing would make progress in designing systems to improve production efficiency and reduce cycle times, the meaningful cautionary statements offered by defendants spoke to overall production problems and an expectation that margins would be lower as a result of the production problems. As Boeing did not actually identify any factors that would have alerted investors to the possibility that production efficiency systems might not be implemented, the necessary meaningful cautionary language was lacking, and the safe harbor did not apply.[111]

Conversely in *Harris*, such factors as "increased competition," "the purchasing decisions of existing customers," "the volatile nature of the generic drug industry itself," "the unpredictability of the degree and timing of price competition," "the speed of the restructuring of the [company's] production facilities," "mistaken

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upon the judicially-created safe harbor known as the 'bespeaks caution' doctrine.").

105. *Trump*, 7 F.3d at 371-72; Rubinstein v. Collins, 20 F.3d 160, 167-68 (5th Cir. 1994); 17 C.F.R. 230.175 (1997).

106. 75 F. Supp. 2d 68 (E.D. N.Y. 1999).

107. *Id.* at 73. *Accord* Copperstone v. TCSI Corp., No. C97-3495SBA, 1999 U.S. Dist. LEXIS 20978, at *45 n.11 (N.D. Cal. Jan. 14, 1999) ("[M]erely prefacing a forward-looking statement with a clause such as 'we expect' or 'we believe' does not constitute sufficient risk disclosure.").

108. *See* note 79, *supra*, and accompanying text quoting the relevant Boeing disclosure.

109. *In re* Boeing Sec. Litig., 40 F. Supp. 2d 1160, 1168 (D. Wash. 1998).

110. *See id.*

111. *See id.* at 1169.

estimates and assumptions concerning customer inventory shelf stock adjustments," and "other information identified in [the company's] SEC filings"[112] were deemed to suffice.[113] This was true particularly where these turned out to be the precise factors that led to IVAX's poorer than expected performance."[114]

c. Actual Factors that Causes Results to Differ Need Not be Listed—Ideally then, a safe harbor disclaimer will warn of all known risk factors that are relevant both to the issuer and to the projections it is making in the given report or press release. But it is clear from the legislative history of the Act that to be protected, an issuer need not (in hindsight) have included *all* factors that might have materially affected the predictive disclosures.[115] According to the Conference Report, "failure to include the particular factor that ultimately causes the forward-looking statement not to come true will not mean that the statement is not protected by the safe harbor."[116]

Case law decided under the PSLRA carries out this Congressional intent. *Harris*, for example, dealt squarely with this issue since it was a fraud by omission case. There, the Eleventh Circuit posed the following question: "To be 'meaningful' [cit. omitted] must the cautionary language explicitly mention the factor that ultimately belies a forward-looking statement?" The answer was negative: "when an investor has been warned of risks of a significance similar to that actually realized, she is sufficiently on notice of the danger of the investment to make an intelligent decision about it according to her own preferences for risk and reward."[117]

d. A Rule of Thumb for Listing Risk Factors?—Because of the nature of company-specific disclosures, no bright line rule can ever be stated as to what will constitute meaningful cautionary language in a particular case. Indeed the notion that the articulated risk factors must be specifically tailored, and that those listed need

112. The district court pointed out that "Congress was explicit in stating that meaningful cautionary language could incorporate by reference information contained in documents filed with the SEC [cit.omitted]." Harris v. Ivax, 998 F. Supp. 1449, 1454 (S.D. Fla. 1998).

113. *Id.*

114. *Id.*

115. "[The PSLRA] does not require a listing of *all* factors." *Harris, 182 F.3d* at 807 (emphasis in original). *See also* Rasheedi v. Cree Research, Inc., *supra* note 58, at *6 ("Defendants do not have to caution against every conceivable factor that may cause results to differ.").

116. *Statement of Managers, supra* note 7, at 44.

117. *Harris,* 182 F.3d at 807.

only be of similar significance to that actually realized, invites further litigation and judicial interpretation. What is clear at this point, however, is that the Act is intended to protect forward-looking statements so long as the issuer identifies substantial known risk factors that are specific to its business and that directly and substantively may affect the disclosed projections.

e. Warning of Existing Facts is not "Cautionary"—Just as labeling existing facts as "forward-looking" will not garner safe harbor, likewise including risks that have already matured in the risk factors or cautionary language section of a safe harbor disclaimer will not do. It has long been the case that "[t]o warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit."[118] Several PSLRA cases have used this as a basis for finding that purported cautionary statements were insufficient to shelter defendants in the Act's safe harbor.[119]

f. The "Accompanied by" Requirement—Finally, it should be noted that the text of the PSLRA requires forward-looking statements to be "accompanied by"[120] a statement of risk factors in order to be harbored. This raises two questions. First, with regard to written disclosures, must the cautionary language be contained within the same document, or can warnings be set forth in other written disclosures? And second, with regard to oral forward-looking statements, must the required cautionary language be recited with each individual projection, or can a blanket disclaimer be made at the outset of the conference call, speech, or interview?

As to the latter, logic seems behind the holding in *Wenger v. Lumisys, Inc.*[121] There, the plaintiffs argued that the statutory language requires each "particular"[122] oral forward-looking statement to be identified as such and accompanied by meaningful cautionary language.[123] Defendants countered persuasively that to

118. Rubinstein v. Collins, 20 F.3d 160, 171 (5th Cir. 1994) (quoting Huddleston v. Herman & MacLean, 640 F.2d 534, 544 (5th Cir. Unit A, 1981)).

119. *See In re* Home Health Corp. of Am., Inc. Sec. Litig., No. CIV98-834, 1999 U.S. Dist. LEXIS 1230, at *30; (E.D. Pa. Jan. 28, 1999) (cautioning investors against assuming it would continue to contract with its managed care organization clients, when in fact two such clients had already terminated their lucrative contracts with issuer). *See also In re* MobileMedia Sec. Litig., 28 F. Supp. 2d 901, 930 (D.N.J. 1998).

120. 15 U.S.C. § 78u-5(c)(1)(A)(i) (quoted in note 21, *supra*).

121. 2 F. Supp. 2d 1231 (N.D. Cal. 1998).

122. 15 U.S.C. § 78u-5(c)(2)(A)(i) (quoted in note 33, *supra*).

123. *See Wenger,* 2 F. Supp. 2d at 1242 (quoting 15 U.S.C. § 78u-5(c)(2)(A)).

require reiteration of risk factors along with each projection in a single oral presentation would bury projections in "statutory white noise."[124] In other words, a defendant making numerous verbal forward-looking disclosures in a single presentation need only have given a single safe harbor warning (including reference to those readily available documents that contain risk factors). The court agreed, pointing out that the legislative history of the Act supported its ruling to that effect.[125]

With respect to written disclosures, the "accompanied by" requirement[126] is more thorny. In most Reform Act cases, the cautionary language appears along with the forward-looking statements, in the same sentence or paragraph,[127] or at least within the same document.[128] This seems to be in keeping with the tenor of the statute. And, it has been argued that the determination of whether a particular disclosure is to be sheltered by the either the "bespeaks caution" doctrine, the SEC safe harbor rules, or the bespeaks caution prong of the Act's safe harbor, should be a "four corners" analysis.[129]

Nonetheless, at least one district court has considered cautionary statements made in other documents and incorporated by reference.[130] That court's analysis relied heavily, however, on the

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124. *Id.* at 1242.

125. *See id.* (quoting the Senate Committee Report as saying "in the case of oral statements, the Committee expects that the notice will be provided at the outset of any general discussion of future events and that further notice will not be necessary during the course of that discussion," S. REP. NO. 104-98, *supra* note 6, at 17; and noting that the House Committee Report had described "the rule governing oral statements as 'flexible' and no more cumbersome than the rules governing written forward looking statements." *Statement of Managers*, *supra* note 7, at 45-46).

126. *See* 15 U.S.C. § 78u-5(c)(1)(A)(i) (quoted in note 21, *supra*). *See also id.* § 78u-5(e), (directing courts to consider, on any dispositive motion based on written disclosures that are alleged to fall within the safe harbor, "any statement cited in the complaint and any *cautionary statement accompanying the forward looking statement*, which are [sic] not subject to material dispute, cited by the defendant.") (emphasis supplied).

127. *See, e.g.*, P. Schoenfeld Asset Mgmt. LLC v. Cendant, Corp. 47 F. Supp. 2d 546, 556 (regarding a press release which indicated that accounting irregularities had been found at certain CUC business units, cautioned that previously issued financial statements should not be relied upon, and estimated the amount of earnings that would need to restated, while alerting investors that the precise amount thereof was contingent upon the findings of the audit committee).

128. *See* discussion of safe harbor warnings or disclaimers, *supra* note 99, and accompanying text.

129. *See* Jonathan B. Lurvey, Note, *Who is Bespeaking to Whom? Plaintiff Sophistication, Market Information, and Forward-Looking Statements*, 45 DUKE L. J. 579, 603-04 (1995).

130. *See* Karacand v. Edwards, 53 F. Supp. 2d 1236, 1248-49 (D. Utah 1999)

"bespeaks caution" doctrine, which was stated to be coextensive with the statutory safe harbor in the Tenth Circuit.[131]

B. The "Immateriality" Prong

The Reform Act also protects forward-looking statements that are "immaterial," whether or not they are accompanied by cautionary language.[132] No case decided under the PSLRA to date has based its holding on that provision of the statute, however. Instead, the courts seem more comfortable dismissing claims based on pre- Reform Act law to the effect that "vague hyperbolic statements" are nothing but "puffery," and therefore immaterial, the type of statements upon which no reasonable investor would or should rely.[133]

1. Vague Forward-Looking Statements of Corporate Optimism —Typical of this approach is *In re Stratosphere Corp. Sec. Litig.*[134] There, the court identified the following, *inter alia*, as forward-looking statements: "we think over time, the Stratosphere will become the symbol of Las Vegas," "there's going to be a line from the day we open for a long, long time," and "with the addition of 1,000 hotel rooms . . . opening of the retail shops . . . as well as additional marketing . . . we believe visitation to the facility should increase and overall operating results should improve."[135] Describing these statements as "soft or puffing,"[136] the court

(discussing a safe harbor warning contained in press release that listed some risk factors and then referred reader to issuer's SEC filing.). *See also* EP Medsystems, Inc. v. EchoCath, Inc., 30 F. Supp. 2d 726, 760-767 (D.N.J. 1998).

131. *See Karacand*, 53 F. Supp. at 1248-49. For a discussion of the precise status of the "bespeaks caution" doctrine in that circuit., *see generally* Jonathan L. Booze, *Comment: A Comparative Analysis of the Application of the Bespeaks Caution Doctrine to Forward-Looking Statements*, 47 KAN. L. REV. 495 (1999).

132. *See* 15 U.S.C. § 78u-5(c)(1)(A)(ii) (quoted in note 21, *supra*). For a possible explanation of the legislative history of this portion of the Act, *see* Coffee, *supra* note 60, at 991.

133. *See, e.g., In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1427-28 (3rd Cir. 1997) (finding vague and therefore immaterial "a general, nonspecific state-ment of optimism or hope that a trend will continue"); San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 811 (2d Cir. 1996) (declaring statements that issuer was "optimistic" about earnings and "expected" good sales were "puffery"); Shapiro v. UJB Financial Corp., 964 F.2d 272, 283 n.12 (3d Cir.) *cert. denied*, 506 U.S. 934, (1992) (finding the statement "United Jersey looks to the future with great optimism" to be "inactionable puffing").

134. 66 F. Supp. 2d 1182 (D. Nev. 1999).

135. *Id.* at 1199.

136. *Id.* at 1198.

dismissed the fraud claims based on them without reference to the "immateriality" prong of the safe harbor.[137]

2. Specific Forward-Looking Statements Expressing Optimism —Besides vague statements of corporate optimism, other cases have found other specific (not vague, puffing) forward-looking statements to be immaterial as a matter of law, and thus also not actionable. For example, the projection "we could have another surprise [referring to component problems encountered in the past], we don't expect any in the [upcoming] quarter" was held to be immaterial[138] and therefore could not support a claim for securities fraud. That court aptly noted that "'surprises' by definition, are unexpected, and the statement is therefore meaningless and immaterial."[139] This makes good sense, and like the pre-Reform Act puffery cases, it leads to the conclusion that no investor would or should have relied on it.

3. Other Immaterial Statements—In another PSLRA case, a sales projection of $25 million and earnings per share estimate of $.55 were held to be nonactionable where the actual sales were $23,002,000, and the actual EPS figure was $.50, the *difference* being immaterial, thus disabling any fraud claims based on these projections.[140] This type of projection is immaterial not in the sense that it precludes reliance, but in the sense that the statement turns out to be essentially true. While this use of immateriality is slightly different than the usual finding that a statement is too vague to justify reliance by an investor, it too appears to fit within the Act's "immateriality" prong.

It is posited that the little-used PSLRA "immateriality" prong merely codifies and incorporates pre-Reform Act "puffery" law, as it applies to projections and other forward-looking statements. Indeed, the Conference Committee seemed to indicate so in allowing that "[c]ourts may *continue to* find a forward-looking

137. *See id.* at 1199. *See also, e.g.,* Wenger v. Lumisys, Inc., 2 F. Supp. 2d 1231, 1245-46 (holding "we're the leader in a rapidly growing market," and "fundamentally, we're just a good company, we know our markets well, we dominate these markets, we have good people, a good management team, and we're positioned to move forward now" to be inactionable as "immaterial," but without citation to the Act). For other PSLRA cases that implicitly use the "immateriality" prong of the PSLRA's safe harbor, *see In re* Advanta Corp. Sec. Litig., 180 F.3d 525, 539; Buck v. Piercing Pagoda, Inc., No. 98-5535, 1999 U.S.Dist. LEXIS 16092, at *5 (E.D. Pa. Oct. 12, 1999); Copperstone, *supra* note 107, at *39-40; *In re* PLC Sys., Inc. Sec. Litig., 41 F. Supp. 2d 106, 118 (D.Mass. 1999).

138. *Karacand*, 53 F. Supp. at 1252.

139. *Id.*

140. *See Wenger*, 2 F. Supp. 2d at 1249.

statement immaterial – and thus not actionable under the 1933 Act and the 1934 Act – on other grounds."[141]

D. The "Actual Knowledge" Prong

If a disclosure is not identified as forward-looking, or it is not accompanied by meaningful cautionary statements (*i.e.* it fails to conform to the "bespeaks caution" prong of the Act) and/or if the disclosure is not held to be immaterial under the "immateriality prong" of the Act, it can still achieve safe harbor if the plaintiff fails to prove that the statement "was made with actual knowledge" of the falsity of the statement or its misleading nature.[142] In the case of a statement made by a corporate officer or other representative, the plaintiff must prove "actual knowledge" by the speaker.[143] In the case of such a statement issued by the issuer as an entity, the plaintiff would have to prove that the statement was approved by an executive officer of the entity and that that approval was given with "actual knowledge" that the statement was false or misleading.[144]

While an in-depth discussion of the "actual knowledge" prong of the safe harbor is beyond the scope of this article, a brief discussion of the only post-Reform Act circuit court opinion addressing this part of the statute is appropriate. In the case of *In Re Advanta Corp. Securities Litigation*[145] the company, a leading issuer of credit cards, sustained a $20 million first quarter loss in 1997, allegedly caused by the adoption of new policies that resulted in many more high risk customers and consequently excessive charged-off accounts.[146] Plaintiffs, former shareholders of Advanta, charged that the company failed to disclose these risky practices even after it became clear that large losses were their inevitable result. And according to the complaint, through various officers Advanta simultaneously made several false or materially misleading statements.[147]

Specifically, the Advanta plaintiffs focused on a statement made by company Vice President for Investor Relations, Janet Point, to the Dow Jones News Service about the company's plans to convert existing accounts at "teaser" interest rates to the usual

141. *Statement of Managers*, *supra* note 7, at 44 (emphasis added).
142. 15 U.S.C. §78u-5(c)(1)(B)(i) (quoted in note 31, *supra*).
143. *Id.* §78u-5(c)(1)(B)(ii) (quoted in note 31, *supra*).
144. *Id.*
145. 180 F.3d 525 (3d Cir. 1999).
146. *See id.* at 528.
147. *See id.*

higher rates, and the effect on revenues of this conversion.[148] Since Point's statement was neither identified as a forward-looking statement nor accompanied by any cautionary language, it could not find safe harbor under the "bespeaks caution" prong of the PSLRA. Neither was there any argument that her statement was immaterial so as to be exempt under prong two. Consequently, the defendants argued the "actual knowledge" prong of the Act safeguarded the statement.[149]

In applying the PSLRA, the Third Circuit scrutinized plaintiff's allegations regarding alleged "actual knowledge." Plaintiff's logic was as follows: in an article published six months later, Advanta's CEO admitted that Advanta did not increase its rates to as high as Point had said the company would, and that since Point was a company representative, she must have known the company would not re-price at the level she had projected.[150] No specific facts were pled to support the necessary inference that Point or anyone at Advanta knew when Point spoke to Dow Jones that the company would not re-price its credit card accounts as high as originally planned.[151] Under these circumstances, the court found that Point's statement was protected by the Act's safe harbor.[152]

Some district court opinions based on the "actual knowledge" prong are similar to the Third Circuit's *Advanta*.[153] But in others, the use of the "actual knowledge" prong to dismiss claims is somewhat implicit or the opinion is devoid of analysis.[154] And in

148. Point was quoted in the September 12, 1996 Dow Jones article as follows: "Over the next six months Advanta will experience a large increase in revenues as it converts more than $5 billion in accounts that are now at teaser rates of about 7% to its normal interest rate of about 17%." *Id.* at 536. This was held to be a forward-looking statement for purposes of the Act. *See* notes 74-76 *supra*, and accompanying text.

149. *See In re* Advanta Corp. Sec. Litig., No. 97CV-4343, 1998 U.S. Dist. LEXIS 10189, at *28-29 (E.D. Pa. July 9, 1998).

150. *See Advanta,* 180 F.3d at 536.

151. *See id.*

152. *See id.* at 537. It is noteworthy that the court found the later news article not inconsistent with Point's statement, *i.e.* Advanta may have intended to do just as Point anticipated, but later changed its strategy. The court described this as at best an "unwise business decision[ ]." *Id.*

153. *See In re* Cendant Corp. Litig., 60 F. Supp. 2d 354, 374-76 (D.N.J. 1999) (reviewing specific factual allegations and determining that plaintiffs have adequately alleged "actual knowledge"); Kensington Capital Management v. Oakley, Inc., No. SA CV 97-808-GLT, 1999 U.S. Dist. LEXIS 385, at *9-11(C.D. Cal., Jan. 14, 1999) (actual knowledge adequately plead); Clark v. TRO Learning, Inc., No. 97 C 8683, 1998 U.S. Dist. LEXIS 7989, at *16-18 (N.D. Ill. May 19, 1998) (actual knowledge inadequately plead).

154. *See* Ruskin v. TIG Holdings, Inc., No. 98 CIV 1068, 1999 U.S. Dist. LEXIS 14860, at *13-14 (S.D.N.Y., Sept. 23, 1999); Queen Uno Ltd. Partnership v. Cocur

most cases the determination is heavily intertwined with the courts' analysis of the heightened pleading requirements established by the Act.[155]

V. Conclusions and Recommendations

There is no question that the protections of the Private Securities Litigation Reform Act are potent. The statute, as supplemented by its expansive legislative history, provides corporate America and the courts with an effective tool with which to combat meritless, abusive securities fraud suits. In response, securities issuers have begun to disseminate carefully drafted "safe harbor warnings" or "disclaimers" along with their external statements. These disclosures and the safe harbor warnings themselves improve the quantity and quality of information available to the investing public.

Issuers who disseminate truthful information have always been protected by the securities laws. Treatment of predictive information, however, has been more troublesome. The PSLRA safe harbor for forward-looking statements is designed to encourage predictive disclosures. The "bespeaks caution" prong of the Act, along with what has been learned from judicial interpretation of it thus far, provides a simple formula for issuer protection when making public its plans, forecasts, and projections.

To be sheltered from liability for forward-looking disclosures, an issuer should follow these guidelines. First, written projections should always be clearly labeled as "forward-looking statements." These should be actual predictions, forecasts, or projections, which may be coupled with their underlying factual assumptions. Whether or not they are couched in language of expectation, descriptions of existing facts that are false when made will not be harbored, under either the Act or pre-existing law.

Merely phrasing forward-looking statements in doubtful or anticipatory language will not suffice under the safe harbor. Instead, as to each area of forward-looking information provided, specific cautionary language should be set forth, in the form of risk factors that are company-specific and which relate directly to the forward-looking statements that are being made. While every effort should be made to identify all known significant risk factors

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D'Alene Mines Corp., 2 F. Supp. 2d 1345, 1359-60 (D. Colo. 1998); Hockey, *supra* note 86, at *21 and *27.

155. *See, e.g.*, Home Health, *supra* note 119, at *28-29; EP Medsystems Inc. v. Echocath, Inc. 30 F. Supp. 2d 726, 761 (D.N.J. 1998).

that might cause the results of the prediction to vary materially from the forward-looking statement, caution should be exercised not to bury necessary and relevant information in legalese. Purported risk factors warning of the possibility of untoward facts that have already occurred will not be sheltered.

Finally, the risk factors should be set forth in the same document as the forward-looking statements. The efficacy of the practice of (in a written safe harbor disclaimer) referring to extrinsic documents containing risk factors is still unsettled under PSLRA case law, and it may result in the loss of safe harbor protection.

Verbal disclosures should commence with a safe harbor warning that identifies the disclosure areas that are forward-looking. It then should refer listeners to readily available written reports, filings or other disclosures that contain specific explicit risk factors, as outlined above. Such a warning need not be given more than once in the context of a single oral presentation.

The second or "immateriality" prong of the Act provides courts with a catchall that incorporates freestanding pre-Reform Act law regarding "puffery." Vague forward-looking statements that express corporate optimism will be protected under this prong. Likewise, the "actual knowledge" prong should provide issuers with some comfort. If any of the above requirements for safe harbor has inadvertently been omitted, in the event of a suit based on unprotected forward-looking statements, the plaintiff will have to prove actual knowledge of falsity on the part of the issuer or its representative making a given disclosure. With the advent of the heightened pleading requirements for scienter, this is increasingly difficult in the spurious cases, as it should be.

To date, the courts have relied upon an amalgam of pre-Reform law and the PSLRA in deciding cases involving alleged securities fraud as it relates to disclosures of forward-looking information. It is suggested that within its sphere of application, uniform employment of the Act will further Congress's intent, and will provide additional certainty for future plaintiffs and issuers alike.